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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/787,631	05/18/2001	Maurice Chazalet	P/3610-12	4668

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EXAMINER

HUI, SAN MING R

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 01/08/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action**

Application N .

09/787,631

Applicant(s)

CHAZALET ET AL.

Examiner

San-ming Hui

Art Unit

1617

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 18 November 2002 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

**PERIOD FOR REPLY** [check either a) or b)]

- a) ☒ The period for reply expires 6 months from the mailing date of the final rejection.
- b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on \_\_\_\_\_. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☒ The proposed amendment(s) will not be entered because:
- (a) ☒ they raise new issues that would require further consideration and/or search (see NOTE below);
  - (b) ☐ they raise the issue of new matter (see Note below);
  - (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
  - (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See attachment.

3. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.
4. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See attachment.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☒ will not be entered or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: None.

Claim(s) objected to: None.

Claim(s) rejected: 1-7 and 11-21.

Claim(s) withdrawn from consideration: None.

8. ☐ The proposed drawing correction filed on \_\_\_\_\_ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_.
10. ☐ Other: \_\_\_\_\_

RUSSEL TRAVERS  
PRIMARY EXAMINER  
GROUP 1200

### ADVISORY ACTION

#### Status of the claims

Claims 1-7 and 11-21 are pending.

#### Continuation of 2):

The proposed amendments filed November 18, 2002 have remove limitations drawn to compounds of Formula (II), that is taught by Seitz et al., cited by the examiner, and therefore, necessitate the examiner to change the basis of the rejections under 35 USC 103 set forth in the previous office action mailed May 16, 2002. Such deletion will therefore, raise new consideration for the examiner.

#### Continuation of 5):

Applicant's arguments filed November 18, 2002 averring synergism is shown in the instant specification have been considered, but are not found persuasive. As discussed in the previous office action, evidence as to unexpected benefits must be "clear and convincing" *In re Lohr*, 137 USPQ 548 (CCPA 1963), and be of a scope reasonably commensurate with the scope of the subject matter claimed, *In re Linder*, 173 USPQ 356 (CCPA 1972). The data provided by Applicants does not clearly and convincingly demonstrate synergism for any combination within the claims and is not reasonably commensurate in scope with the instant claims. For example, examples 1 to 4 in page 31 to 38 in the specification relate only to certain fungal species and the employment of 3 compounds useful from genus herein in a fungicidal combination in accordance with the claims (i.e., compound A, B, and C in the specification). A

Art Unit: 1617

supraadditive effect for the combinations of individual agents herein, based on raw data on the same individual agents in comparison to their corresponding combination, is not present. Without knowing the individual activities of the herein claimed compounds, evaluating whether the demonstrated effects are in fact unexpected would be impossible. Furthermore, absent claims commensurate with a showing of any unexpected benefits, or a showing reasonably commensurate with the instant claims, such claims remain properly rejected under 35 USC 103.

Since the proposed amendments filed November 18, 2002 are not entered, the rejections set forth in the previous office action remain. No unanswered rebuttal argument is seen herein.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to San-ming Hui whose telephone number is (703) 305-1002. The examiner can normally be reached on Mon 9:00 to 1:00, Tu - Fri from 9:00 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sreeni Padmanabhan, PhD., can be reached on (703) 305-1877. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 308-4556 for regular communications and (703) 308-4556 for After Final communications.


Application/Control Number: 09/787,631

Page 4

Art Unit: 1617

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-1235.

San-ming Hui  
January 2, 2003

  
RUSSELL TRAVERS  
PRIMARY EXAMINER  
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